# Recommendation 88-8

## Resolution of Claims Against Savings Receiverships

(Adopted September 16, 1988)

When a federally insured savings and loan institution ("thrift") fails, the Federal Home Loan Bank Board (FHLBB) exercises overall regulatory control. The Federal Savings and Loan Insurance Corporation (FSLIC), under the direction of the FHLBB, ordinarily acts as receiver for federally insured thrifts, and, in that capacity, must pay the valid credit obligations of the failed thrift. In the process of accepting, settling or rejecting a diverse and complex range of creditor claims, the FSLIC attempts to resolve disputes informally. If this cannot be done, claimants may resort to an adjudicative process. The locus of this adjudication—agency or court—and its elements are the concerns of this recommendation.

*Exclusivity of the Agency Adjudication Process.* The FHLBB and its sister agency, the FSLIC, have asserted exclusive jurisdiction to adjudicate creditor claims against thrift receiverships. To establish and enforce its asserted power as receiver to adjudicate creditor claims, the FSLIC has adopted the practice of seeking to have claims litigation that has been initiated in state courts removed to the federal courts, where the FSLIC then moves for dismissal for want of subject matter jurisdiction. The agency has sometimes moved to override court judgments granted to creditors that were entered before a thrift was placed in receivership.

The FSLIC's argument is that, as receiver, it has been vested with exclusive power to determine the validity of creditor claims, and that the jurisdiction of the courts to make independent determinations has been precluded. It is further argued by the FHLBB and FSLIC that their final administrative determinations are subject, not to *de novo* judicial review, but only to the limited judicial review provided under the Administrative Procedure Act. This agency position has become known as the *Hudspeth* doctrine, after the Fifth Circuit decision in which it was first accepted *(North Mississippi Savings and Loan Association v. Hudspeth,* 756 F.2d 1096 (5th Cir. 1985)). But other courts have declined to follow *Hudspeth*. See, e.g., *Morrison-Knudsen Co., Inc. v. CHG International, Inc.,* 811 F.2d 1209 (9th Cir. 1987), holding that the FSLIC has no statutory authority to adjudicate claims to the exclusion of the courts. The U.S. Supreme Court has granted *certioriari* to resolve the differences. See *Coit Independence Joint Venture v. First South, F.A,* 829 F.2d 563 (5th Cir. 1987), *cert. granted,* 108 S. Ct. 1105 (1988).

Because of the considerable adjudicatory power that the *Hudspeth* doctrine potentially grants to the FSLIC, the doctrine has provoked controversy concerning the fairness, efficiency, and legal and constitutional validity of the administrative procedures. In fact, the position of the Solicitor General in its brief for the Government in the *Coit* case does not endorse the FHLBB's argument that it is statutorily empowered to "adjudicate" these claims. The Solicitor General maintains that, while Congress could have provided for administrative adjudication in this context, it has simply (and appropriately) provided for a claims review step in the process that must be exhausted by claimants before they seek judicial resolution of claims.

The Conference takes no position on the statutory and constitutional power of the FHLBB to resolve these claims. Unless the Supreme Court finds administrative adjudication in this context to be constitutionally impermissible, Congress should examine the need for agency adjudication of such claims, as an alternative to, or at least a required prelude to, *de novo* resolution of such claims in state and federal courts. For this reason, the Conference has examined the fairness and efficiency of the current administrative procedure for determining creditor claims against thrift receiverships.

*Current Claims Procedures.* Claims against failed thrifts are institutionally and procedurally separated at the FSLIC. Those made by insured depositors on the one hand, and uninsured depositors and other creditors on the other, are handled by separate divisions within the FSLIC. Although many claims are resolved at the division level (so-called "receiver's determinations"), rejected claimants may seek administrative review by the Adjudication Division of the FHLBB's Office of General Counsel, with final administrative review by the Board itself in complex cases. Though the case law is unsettled, *de novo* judicial review has been allowed in the case of insured depositor claims and, under the *Hudspeth* decision, limited judicial review under the Administrative Procedure Act was contemplated in the case of noninsured and general creditor claims.

*Need for Congressional Attention.* As thrift receiverships proliferate, the Conference urges Congress to consider whether it is more appropriate for disputes over claims filed against such receiverships to be decided by the FHLBB, or whether it is better to leave them to *de novo* resolution in state and federal courts—with or without a prior administrative claims review step at the FHLBB.

If Congress does determine that an administrative adjudication process (coupled with appropriate judicial review) is the preferable approach, it should clarify the FHLBB's statutory authority. It should provide for an adjudicative system that makes clear that claimants have an

opportunity to have their claims heard by adjudicators who are completely independent of other offices of the FHLBB or FSLIC, which may be perceived to have a financial interest in the outcome of such claims. To that end, a bifurcated hearing process should be established, offering claimants who can demonstrate that an issue of material fact is genuinely presented an opportunity for an on-the-record APA hearing presided over by an administrative law judge. An alternative, simplified procedure should be authorized for other cases or where parties agree to use it.

The FHLBB's current program of adjudicating claims against receiverships requires two additional improvements. First, final rules of practice need to be issued,[1] and time limits should be established. Second, the agency should refrain from attempting to override prereceivership judgments entered in federal or state courts.

**Recommendation**

1. Congress should determine whether disputes over claims filed against thrift receiverships are better decided by the Federal Home Loan Bank Board (FHLBB) in an administrative adjudication process (coupled with judicial review) or by the judiciary through *de novo* resolution in state or federal courts (with or without a prior administrative claims review step at the FHLBB).[2]

2. If Congress does determine that an administrative adjudication process is the more desirable approach, it should clarify the FHLBB's statutory authority by providing for an FHLBB adjudicative process along the lines set forth below:

(a) A bifurcated process should be established for adjudicating claimant appeals from determinations of thrift receivers. Where the claimant affirmatively demonstrates that an issue of material fact is genuinely presented, the FHLBB should offer an opportunity for an on-the-record APA hearing, presided over by an administrative law judge. In all other cases, or where the parties voluntarily agree, the FHLBB should be authorized to use simplified, less formal procedures, presided over by persons who need not be ALJs but who should be institutionally

[1] On November 8, 1985 the FHLBB published proposed rules governing its claims adjudication process (see 50 FR 48970). On April 21, 1988 the FHLBB published interim procedures pending the adoption of final regulations, giving notice that the interim procedures that have been in effect in practice since July 1, 1986 will remain in effect pending the adoption of final regulations. See 53 FR 13105.

[2] The Conference, at this time, does not intend to express an opinion on which of these alternatives is preferable.

separate from the receiver.[3] All parties, including receivers, should be encouraged to engage in alternative means of dispute resolution.[4]

(b) Final FHLBB decisions on such claims should be based on the administrative record and subject to direct judicial review in accordance with the principles stated in ACUS Recommendation 75-3 ("The Choice of Forum for Judicial Review of Administrative Action").

3. The FHLBB should publish, after a notice-and-comment rulemaking procedure, final rules setting forth its rules of practice for claims determinations. The rules should provide for strict, albeit reasonable, time limits[5] applicable not only to claimants but also to receivers and their agents.

4. The FHLBB (and FSLIC as receiver) should not override prereceivership judgments entered in federal and state courts. The agencies' power to adjudicate claims should not encompass judgments in favor of creditors that have been entered by a court of competent jurisdiction before the thrift was placed in receivership. The FSLIC as receiver should either acquiesce in these judgments or pursue post-trial remedies.

5. Congress should include in any legislation responsive to this recommendation a requirement that the FHLBB adopt appropriate regulations and policies as set out in paragraphs 3 and 4.

**Citations:**

53 FR 39587 (October 11, 1988)

__ FR _____ (2011)

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**Note:**

The issues addressed by this recommendation were resolved by the Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub. L. 101-73. 101 Stat. 183.

[3] See ACUS Statement, "Dispute Resolution Procedure in Reparations and Similar Cases," 1 CFR 310.13 (1988).
[4] See ACUS Recommendation 86-3, "Agencies' Use of Alternative Means of Dispute Resolution," 1 CFR 305.86-3 (1988).
[5] See ACUS Recommendation 78-3, "Time Limits on Agency Action," 1 CFR 305.78-3 (1988).